

lines from its switch. Thus, I also eliminated LDMI as a trigger CLEC because it does not provide service to the entire mass market.

Even if LDMI were not eliminated as inactive, it clearly is not operationally ready for mass-market entry via UNE-L. LDMI indicates that it has at most a minimal electronic interface with SBC or other CLECs.¹⁴ LDMI also does not have any internal automated systems to process its own retail orders when it uses its own switch.¹⁵

Moreover, LDMI indicated that it serves more than *****BEGIN PROPRIETARY . END PROPRIETARY*****¹⁶ LDMI is thus another example of a case in which SBC's approach to trigger analysis would have a drastic and unreasonable effect, robbing *****BEGIN PROPRIETARY END PROPRIETARY***** of Michigan customers of the competitive choice they have made because of a handful of loops inherited from another carrier's failed business plan.

LDMI illustrates that mere ownership of a switch that serves some mass-market customers does not necessarily relate to a strategy to enter any well-defined market at all (let alone an MSA). LDMI states it has no idea why its switch does or does not connect with any given SBC wire center as those decisions were made by someone at Mpower for reasons that LDMI "cannot speak to."¹⁷

SBC's data further confirm that LDMI's mass-market UNE-L entry is minimal and incidental. Although SBC identified a total of *****BEGIN PROPRIETARY END**

¹⁴ LDMI response to MCI Data Requests MCIC-11, and MCIC-16 through MCIC-18, 12/9/03.

¹⁵ LDMI response to MCI Data Requests MCIC-19 and MCIC-22, 12/9/03.

¹⁶ LDMI response to ACN/Z-Tel/Talk Requests 1.01 and 1.02.

¹⁷ LDMI response to MCI Data Requests MCIC-47, 12/9/03.

PROPRIETARY*** supposed mass-market loops for LDMI in the seven MSAs at issue in this proceeding, those loops are spread across *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers. The supposed mass-market loops in those wire centers range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found LDMI to have any mass-market loops. LDMI does not achieve even a *****BEGIN PROPRIETARY END PROPRIETARY***** market share in any wire center and achieves greater than a *****BEGIN PROPRIETARY END PROPRIETARY***** market share in *****BEGIN PROPRIETARY END PROPRIETARY***** wire center, based on SBC's data. If it had not been eliminated because it is not an active market participant and is not serving all mass-market customers, LDMI *****BEGIN PROPRIETARY END PROPRIETARY***** based on the 1% market share screen.

Thus, there are multiple bases on which the Commission could exclude LDMI entirely from the retail trigger count for mass-market switching.

McLeodUSA

SBC claimed McLeodUSA as a triggering carrier. McLeodUSA's responses to Staff's First data request indicated that McLeodUSA serves Michigan customers using *****BEGIN PROPRIETARY . END PROPRIETARY***** McLeodUSA's Web site indicates that it generally serves both residential and small business mass-market customers. Although McLeodUSA does serve some residential accounts, its focus appears to be on business customers. McLeodUSA itself reports only that only

*****BEGIN PROPRIETARY END PROPRIETARY***** serve residential customers.¹⁸

Moreover, McLeodUSA has indicated that it is shedding customers who produce less than \$113 a month in revenue,¹⁹ meaning it is almost certainly shedding its residential customers. For these reasons, MCI's Opening Brief eliminated McLeodUSA on the "serves residential customers" screen.

SBC identified a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops for McLeodUSA spread across *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in the seven MSAs for which SBC is seeking a finding of no impairment. The supposed McLeod mass-market loops range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found McLeod to be serving any mass-market loops.

Even if it had not been screened out on the "serves residential customers" criterion, McLeodUSA's market share equals or exceeds 1% in only *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in the SBC seven MSAs. Hence, in all but those instances, I would have excluded McLeodUSA from the retail trigger count for mass-market switching for SBC.

McLeodUSA also appears to provide a good illustration of the potential harm to facilities-based competition of prematurely eliminating the UNE-P option for mass-market customers in an overly broad market, such as on an MSA-wide basis. McLeodUSA's Michigan tariff includes a wire center by wire center listing of which

¹⁸ McLeodUSA response to Staff's First Data Request, column AH and AI totals.

¹⁹ Gillan Cross Examination, Tr. at 2663.

delivery platform McLeodUSA currently uses in Michigan. Specifically, the McLeodUSA tariff indicates where it provides service using “the McLeodUSA Class 5 Local Switch in combination with a local loop leased from the incumbent carrier” as opposed to using “a combination of network elements.”²⁰ Based on that information for McLeodUSA’s residential offering, I note that McLeodUSA continues to use “network elements” (primarily UNE-P and hence UNE switching, but perhaps also some resale) to deliver service in a significant number of wire centers. For example, even in the Detroit and Grand Rapids MSAs, McLeodUSA indicates that it continues to use UNE-P as its delivery vehicle in a number of SBC wire centers. In Grand Rapids alone, McLeodUSA’s tariff states that it relies on UNE-P in at least five SBC wire centers *****BEGIN PROPRIETARY END PROPRIETARY*****. Thus, McLeodUSA’s tariff indicates that it does not provide UNE-L service at all in an area in Grand Rapids in which SBC has more than *****BEGIN PROPRIETARY END PROPRIETARY***** loops. This information suggests that, even in MSAs in which they serve mass-market customers via UNE-L in a nontrivial number of wire centers, facilities-based carriers may rely on a UNE-P option in other wire centers to enable ubiquitous coverage, despite the economic incentive to maximize switch utilization.

Some of the specific loop counts noted above may be the result of mismatched timing between SBC’s data and McLeodUSA’s tariffs; nevertheless, the point is important. McLeodUSA’s recent public statements make clear that, although the company is working on “continued migration of customers from resale to higher margin

²⁰ McLeodUSA Telecommunications Services, Inc., Tariff M.P.S.C. No. 7R. Definitions are from the First Revised Sheet No. 18. Listings of McLeodUSA’s delivery platform by wire center are included in section 5.0, at sheets 113-129. The information cited was current as of February 10, 2004, the date of the rebuttal filing in Michigan PSC Case No. U-13796.

platforms, as well as installation of new customers on-switch,” it still relies on a substantial amount of UNE-P to achieve a viable customer base as it expands its facility-based network.²¹

At most, McLeodUSA’s actual deployment demonstrates that, in a handful of SBC wire centers, McLeod has been able to provide UNE-L services at a volume that meets my minimum threshold for demonstrating that the company has had some success in overcoming barriers to entry.

MCI

SBC cited MCI (WorldCom) as a triggering carrier. SBC identified a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops for MCI spread across *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in the SBC seven MSAs at issue in this proceeding. The supposed MCI mass-market loops range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found MCI to be serving any mass-market loops.

SBC’s claim demonstrates the fallacy of the company’s application of the trigger test. MCI relies on UNE-P as its predominant vehicle for serving mass-market customers. Indeed, MCI states that its only mass marketing is for its “Neighborhood”

²¹ McLeodUSA Reports Third Quarter 2003 Results (press release), 10/22/03, at 2. Also see the “Selected Telecommunications Statistical Data” provided as part of that press release, which indicate that McLeodUSA is gradually decreasing the level of UNE-P in its network but still relied on UNE-P as its delivery platform for 32% of its lines as of September 30, 2003. Exhibit A to McLeodUSA’s response to MCI’s First Set of Discovery reports numbers that differ from SBC’s and that also do not match the designations in its tariff. However, that attachment confirms that McLeodUSA relies on UNE-P to provide for *****BEGIN PROPRIETARY END PROPRIETARY***** of Michigan wire centers.

product, which is UNE-P based.²² I understand that MCI does not serve residential customers via UNE-L except in very specific conditions related to Brooks Fiber facilities in limited areas—*i.e.*, in a manner that has nothing whatsoever to do with the company's "forward-looking" mass-market entry.²³ Instead, MCI provides residential mass-market loops where it has inherited those loops from a prior CLEC and the resulting customers do not have an alternative local service provider available.

Moreover, I am informed that MCI does not use mass media to market *any* UNE-L services to mass-market customers. Instead, the media advertising from MCI concerning residential and small business offerings is all directed toward MCI's UNE-P based product. To the extent that MCI serves any small business customers via UNE-L, it currently obtains those customers through direct sales contact with medium and large business customers. This information discredits one of SBC's alleged bases for its MSA market definition because MCI does not use mass media in conjunction with so-called "mass-market" UNE-L; the economies of scale and scope for direct sales contacts are quite different from those associated with media advertising and are consistent with a more circumscribed market definition.

I also understand that the "small businesses" that MCI serves via UNE-L often are not small businesses at all. Instead, in many instances, MCI provides three or fewer UNE-L lines to a single business location as part of a package of telecommunications services that includes DS-1 and/or other high-capacity, high-volume services suitable to

²² MCI response to ACN/Z-Tel/Talk request, 1.07.

²³ Michigan PSC Case No. 13796, Rebuttal Testimony of Sherry Lichtenberg, February 10, 2004. Ms. Lichtenberg is a Senior Manager in the Operations Support Systems and Facilities Development Business Unit for MCI.

enterprise customers, as the FCC has defined that term. The ability to serve a small volume of such analog loops as part of a package of services does not provide probative evidence of the ability to overcome economic and operational barriers with respect to mass-market switching.

I eliminated MCI from the trigger analysis based on the “serves residential customers” screen.

Had I not done so, MCI’s low volumes (which reflect the “incidental” nature of much of its business services via analog UNE loops) as reported by SBC would have caused the company to fall out of the analysis in all but *****BEGIN PROPRIETARY
END PROPRIETARY***** wire centers after I applied the 1% market share screen.

MCI’s data related to those wire centers raise further questions concerning that data on which SBC has chosen to rely in its trigger analysis. In wire center *****BEGIN PROPRIETARY .²⁴ END PROPRIETARY***²⁵** Both of these examples suggest potentially substantial miscounts in SBC’s data. Until such discrepancies can be investigated, the Commission should not rely on SBC’s claims to eliminate mass market UNE switching. As my “trigger” analysis is based entirely on SBC’s self-reported numbers, it is further conservative to the extent that SBC’s reported line counts are exaggerated.

Mich Tel

SBC included Mich Tel in its count of triggering CLECs in *****BEGIN PROPRIETARY END PROPRIETARY***** MSAs even though SBC’s own data

²⁴ MCI amendment to its responses to Staff’s discovery, 12/18/03.

²⁵ *Id.*

indicate that it would be generous to describe Mich Tel's use of UNE-L as marginal. SBC's own data indicate that Mich Tel's supposed mass-market UNE-L entry consists of a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops in *****BEGIN PROPRIETARY END PROPRIETARY***** Michigan wire centers within the MSAs for which SBC seeks a finding of no impairment. The supposed Mich Tel mass-market loops range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found Mich Tel to have any mass-market loops. As with a number of other CLECs on SBC's trigger list, the Mich Tel mass-market loop counts are sufficiently low that they may be as much the product as SBC data errors as of any real UNE-L entry.

The various Mich Tel related Web sites that I was able to locate shed no additional light.²⁶ Instead, they indicate that the company is somehow involved in a wide range of lines of businesses including long distance, Internet services, wireless service, high speed data services, collocation and interoffice facilities and even PC and equipment sales. The overall impression is that Mich Tel is largely oriented toward ISP services. But, as no specific list of available phone services is provided, it is impossible to confirm that impression.

Due to the lack of any evidence supporting Mich Tel's status as an active and continuing provider of services, especially to residential customers, MCI's Opening Brief disqualified Mich Tel on both the active and continuing and residential screens. Even if these screens had not been applied, Mich Tel would be disqualified as a trigger

²⁶ E.g., <http://www.michtel.com/index.shtml>, <http://www.michtel.com/hosting/colocation.shtml>, and <http://www.metrocell.com/metrocell/frames.asp>.

BEGIN PROPRIETARY END PROPRIETARY based on the 1.0% market share screen. Indeed, it has not achieved more than ***BEGIN PROPRIETARY END PROPRIETARY***.

TDS

SBC claimed TDS as a triggering carrier. TDS did not, to the best of my knowledge, provide substantive responses to any discovery issued in Michigan PSC Case No. 13796 except for Staff's.²⁷ However, even in response to Staff's request, TDS objected to providing any data regarding the number of loops of any type it serves using its own switches. Hence, there are no data at my disposal with which to evaluate SBC's claims. SBC, however, identified a total of ***BEGIN PROPRIETARY END PROPRIETARY*** supposed mass-market loops for TDS spread across ***BEGIN PROPRIETARY END PROPRIETARY*** wire centers in the seven MSAs at issue in this proceeding.

TDS's primary business is cellular service through its U.S. Cellular operations, with 4.1 million wireless lines in service in 25 states.²⁸ Secondly, it is an ILEC, with ILEC operations split among 111 subsidiaries that serve "711,200 access line equivalents in 28 states."²⁹ After that TDS is a CLEC that has two subsidiary CLEC operations with "291,400 access line equivalents in five states."³⁰ TDS's CLEC line of business is very

²⁷ TDS's reply to MCI's discovery consists almost entirely of objections and the claim that its responses to Staff were sufficient.

²⁸ Telephone and Data Systems, Inc. ("TDS"), 2002 Annual Report, at 2-4.

²⁹ *Id.*

³⁰ *Id.* I also note that lines reported as "equivalents" can be misleading as, for example, a few physical DS-3 lines can be reported as many hundreds or thousands of "equivalent" lines.

deliberately linked to and leveraged off of its ILEC operations. TDS describes the strength of its CLEC operations as follows:

By carefully choosing its areas of operations near [ILEC] TDS Telecom's existing operations, TDS Metrocom is able to leverage TDS Telecom's management and process infrastructures. TDS Telecom provides shared services for functions such as billing, accounting, regulatory affairs and human resources, allowing TDS Metrocom to focus its own resources on marketing, selling and serving the customer – critical areas to support rapid growth.³¹

TDS's President and Chief Executive Officer recently reinforced this approach:

We are continuing to grow our CLEC businesses, TDS Metrocom and U. S. Link. Metrocom is being grown aggressively using our distinctive formula for success—that is leveraging the strengths of our well established ILEC business to create a high quality, cost effective sales offering very quickly in the markets we choose to enter. Metrocom uses extensive support in many forms from TDS Telecom's ILEC, leaving Metrocom free to concentrate its energies on marketing and selling to customers. Metrocom brought this successful approach to southern Michigan last year.³²

Thus, in Michigan as elsewhere, it appears that TDS is an ILEC leveraging its assets into new markets. Although TDS does apparently target mass market customers, it only does so where it can use its ILEC resources to maximum advantage in doing so. The Michigan PSC's list of Regulated Local Telephone Companies Licensed in Michigan (as of January 26, 2004) lists five distinct TDS-affiliated ILEC operations in Michigan—Chatham Telephone Co., Communications Corp. of MI ("CCM"), Island Telephone

³¹ *Id.* at 4.

³² <http://www.tellda.com/investor/invpresentation05232002.htm>, remarks of Ted Carlson, TDS Annual Meeting, 5/23/02, discussion accompanying slide 10.

Company, Shiawassee Telephone Co., and Wolverine Telephone Co.³³ I have, therefore, excluded TDS as an ILEC affiliate.

TDS does appear to serve mass-market customers and, based on SBC's data, appears to have more than a 1% market share in *****BEGIN PROPRIETARY END PROPRIETARY***** SBC wire centers. Thus, if it were not an ILEC affiliate, TDS would count toward the retail trigger in those wire centers.

XO Communications

The final triggering company claimed by SBC is XO. SBC identified a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops for XO in the seven MSAs for which it seeks a finding of no impairment. The supposed XO mass-market loops in those wire centers range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in the *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in which SBC found XO to be serving any mass-market loops.

It is my understanding that XO does not provide service to residential customers and has not indicated any intention of doing so.³⁴ Moreover, like KMC, XO has confirmed that:

... it should not be considered a Self Provider of analog Plain Old telephone Service ("POTS") to the mass market segment utilizing its switches in Michigan. At this time, the principal business of XO is to serve Enterprise customers and not Mass Market customers in the area in

³³ <http://www.cis.state.mi.us/mpsc/comm/clec/newlocal.pdf>

³⁴ XO response to Staff's First data request, which reports one switch with no residential customers. Also, XO response to MCIC-62 and MCIC-53, in which XO states that "...no residential customer has requested service from the Company."

Michigan where our switch is located. Today, XO actively seeks to serve Enterprise customers, who have a high demand for a variety of sophisticated data-centric telecommunications services and solutions. XO's success has been in serving Enterprise customers not Mass Market customers.

XO actively seeks to serve customers who plan to purchase digital service at capacities that justify the use of DS1-level loops ...³⁵

The XO Web site confirms that XO does not actively market service to residential customers.³⁶ Therefore, I eliminated XO from my analysis based on the "serves residential customers" screen.

Had I not applied this screen, XO would have failed the 1% market share screen in *****BEGIN PROPRIETARY END PROPRIETARY***** in which SBC identifies XO as providing mass-market loops. A carrier that fails this screen in any geographic market is a carrier whose actual deployment provides no meaningful evidence of overcoming economic and operational barriers to serving mass-market customers via UNE-L. Indeed, XO's service volumes do not exceed a *****BEGIN PROPRIETARY END PROPRIETARY***** market share in any SBC wire center. These low volumes provide a second, independent reason for the Commission to disregard SBC's claim that XO should be counted toward the retail trigger for mass-market switching.

³⁵ XO Supplemental response to MCI's First Set of Discovery, 02/02/04.

³⁶ The XO page (<http://www.xo.com/>) provides information about services for "Small & Growing Business," "Large Business" and "Carrier Services." I was not able to find any reference to a residential service offering.

MURRAY REPLY DECLARATION

EXHIBIT 6

**(ELECTRONIC ONLY) SPREADSHEET TOOL SHOWING WIRE CENTER LEVEL
TRIGGER ANALYSIS FOR SBC MICHIGAN – SEE CD**

REDACTED – FOR PUBLIC INSPECTION

MURRAY REPLY DECLARATION

EXHIBIT 7

**(ELECTRONIC ONLY) SPREADSHEET TOOL SHOWING MSA-LEVEL TRIGGER
ANALYSIS FOR SBC MICHIGAN – SEE CD**

REDACTED – FOR PUBLIC INSPECTION

MURRAY REPLY DECLARATION

EXHIBIT 8

**SUMMARY OF EVIDENCE CONCERNING COMPANIES
THAT SBC COUNTED TOWARD THE RETAIL TRIGGER IN TEXAS**

REDACTED – FOR PUBLIC INSPECTION

SBC claimed to have identified thirteen¹ companies as counting toward the retail trigger in the five Texas MSAs in which it sought a finding of no impairment in PUCT Docket No. 28607. These companies are: Allegiance Telecom (“Allegiance”), AT&T Communications (“AT&T”), Birch Telecom (“Birch”), Cable Plus, Comcast, Grande Communications (“Grande”), ICG Communications (“ICG”), KMC Telecom (“KMC”), MCI (shown as WorldCom) (“MCI”), McLeodUSA, Millennium Telecom (also known as “One Source”) (“Millennium”), XO Communications (“XO”) and Xspedius. I discuss each of the companies in this exhibit, focusing on attributes relevant to the determination of whether the competitor should count toward the retail trigger for mass-market switching. In some cases, I discuss information that potentially disqualifies the CLEC in question from being counted toward the retail trigger, but did not actually disqualify the CLEC on that basis in my own (relatively conservative) analysis of SBC’s triggering CLEC claims in the Texas state impairment proceeding.

Allegiance

Because Allegiance recently has been acquired by XO, I recommend that the Commission treat Allegiance as being affiliated with another CLEC for purposes of the trigger count. Consistent with that recommendation, I have considered XO and Allegiance as if they were a single, combined CLEC (XO/Allegiance) in my analysis of SBC’s trigger claims. I note that Allegiance states that it has “no information to suggest

¹ PUCT Docket No. 28607, Direct Testimony of Jon R. Loehman, February 9, 2004 (hereinafter, “Loehman Direct”), Attachment JRL-10.

that our operations, as they relate to whether or not Allegiance is a triggering mass market switching provider, will change in any respect as a result of the XO purchase.”²

Prior to its acquisition, Allegiance established that it does not offer *any* residential services in Texas.³ Allegiance further states that it “primarily offers UNE-L services to 3-24 line customers.”⁴ Thus, had Allegiance not been acquired by another claimed trigger CLEC, I would have eliminated the stand-alone company when applying my trigger screen that determines whether a carrier offers retail local exchange service to the bulk of mass market customers, *i.e.*, *residential* mass-market customers. Allegiance further establishes that it relies on SBC’s UNE-P offering to provide service to about 10% of its business customer lines in Texas.⁵

Finally, had I not eliminated Allegiance on any other basis, it would have dropped out of *****BEGIN PROPRIETARY END PROPRIETARY***** based on the 1% market share screen that I apply to determine that the CLEC’s market penetration is sufficient to demonstrate at least to some degree that it has overcome operational and economic barriers to entry.

² Allegiance response to MCI Second Requests for Information, 3/9/04, Request 2-2. Copies of this response and each of the other data responses and files produced in discovery that I cite in this exhibit as documentation for my categorization of the claimed triggering CLECs were entered into the record of the Texas mass-market switching impairment proceeding as part of attachments to my March 19, 2004 Rebuttal Testimony in PUCT Docket No. 28607.

³ Allegiance response to MCI First Requests for Information to Parties, 12/11/03, Request MCIC-2. Also, Allegiance response to MCI Second Requests for Information to Parties, 3/9/04, Request MCI 2-3.

⁴ Allegiance response to MCI Second Requests for Information to Parties, 3/9/04, Request MCI 2-6. SBC’s own E911 data indicate that Allegiance had *****BEGIN PROPRIETARY END PROPRIETARY***** (The E911 data in question appear in the SBC response Joint CLEC Requests for Information, Request 2-7, in the file TX RFI 2-7 E911.xls.)

⁵ Allegiance response to MCI Second Requests for Information to Parties, 3/9/04, Request MCI 2-4.

I discuss my conclusions about the “combined” operations of XO and Allegiance below, under the “XO” heading.

AT&T

AT&T indicates that it owns *****BEGIN PROPRIETARY END PROPRIETARY***** in Texas.⁶ Those *****BEGIN PROPRIETARY⁷ END PROPRIETARY*****

Most of the end-user telephone numbers served via AT&T-owned switches are not, in fact, numbers associated with AT&T retail customers. AT&T indicates that it attempted to determine the total business lines that might be served using UNE-L and was able to track to a specific Texas wire center only *****BEGIN PROPRIETARY⁸ END PROPRIETARY***** AT&T also explains that it serves *****BEGIN PROPRIETARY END PROPRIETARY***** “PRIME Path” services (a service that can be provisioned over either UNE-P or UNE-L), but that the “vast majority” of those customers “are served by high-capacity lines” instead of DS-0 lines.⁹

AT&T indicates that it does not provide any service via its own switches to residential customers.¹⁰ This fact is confirmed by SBC’s *****BEGIN PROPRIETARY**

⁶ AT&T Response to SBC’s First Requests for Information, 12/3/03, Requests 1-1 and 1-3(v).

⁷ AT&T Response to SBC’s First Requests for Information, 12/3/03, Request 1-4(i).

⁸ AT&T Response to SBC’s First Requests for Information, 12/3/03, Request 1-4(v).

⁹ AT&T Response to Bench Requests Nos. 4 and 5.

¹⁰ AT&T’s Response to Bench Requests Nos. 3; AT&T response to SBC’s First Requests for Information, No. 1-4(iv); AT&T Response to MCI’s Second Requests for Information, MCI 2-3 and 2-23.

¹¹ **END PROPRIETARY***** Therefore, I eliminated AT&T from the analysis based on my trigger screen that determines whether a carrier offers retail local exchange service to *residential* mass-market customers.

SBC's data confirm that AT&T's mass-market UNE-L entry is minimal. SBC identified a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops for AT&T in *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in the SBC five MSAs. The supposed AT&T mass-market loops range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found AT&T to have any mass-market loops. Given SBC's apparent data quality problems, such low numbers could fall within a reasonable "margin of error" in many wire centers (*i.e.*, it is unclear that these numbers are sufficiently different from zero to be confident that AT&T actually has any UNE-L customers in those wire centers).

Even if I had not eliminated AT&T on the basis of the residential screen, AT&T would have dropped out of *****BEGIN PROPRIETARY END PROPRIETARY***** based on the 1% market share screen. AT&T's market share is no higher than *****BEGIN PROPRIETARY . END PROPRIETARY***** Thus, AT&T's self-deployment of switching to serve mass-market customers does not have sufficient scale to demonstrate that AT&T has overcome economic and operational barriers to entry without access to SBC's unbundled switching.

¹¹ SBC Response to Joint CLEC Requests for Information, Request 2-7, attached file "TX RFI 2-7 E911.xls."

Birch

Birch states that all of the switches that it uses to provide service in Texas are owned by its affiliate, Ionex Communications, South, Inc., and were placed by Ionex prior to its merger with Birch.¹² Birch suggests that, as all decisions regarding which SBC wire centers those switches should subtend were made “long before the merger,” it can only presume that its switches do not connect with other SBC wire centers because “it was not a prudent business decision” to do so.¹³

Birch asserts that it is not an active and continuing provider of mass-market local exchange service in Texas via self-deployed switching:

Birch is not currently “actively providing” mass market voice services to business or residential customers via UNE-L. Birch inherited a very small legacy base of customers served via UNE-L in its merger with Ionex Telecom, and is attempting to maintain this customer base. However, Birch has not utilized the UNE-L mode of provisioning to mass market customers since it assumed management control over the merged entity in March 2003 because to do so has proven to be economically and operationally impairing.¹⁴

On that basis, I have eliminated Birch as not being an active and continuing provider to mass market customers using self-deployed switching. Indeed, Birch states that it “only offers mass market services served via UNE-P.”¹⁵

Of the *****BEGIN PROPRIETARY END PROPRIETARY***** switches that Birch uses to provide service in Texas, it reports that *****BEGIN PROPRIETARY.**¹⁶ ¹⁷

¹² Birch Response to MCI’s First Requests for Information, request MCIC-4. The merger finalized on March 20, 2003. See <http://www.birch.com/newsreleases/2003/032003.shtml>.

¹³ Birch Response to MCI’s First Requests for Information, request MCIC-8.

¹⁴ Birch Response to Sprint First Requests for Information, Request Sprint 1.1.

¹⁵ Birch Response to Sprint First Requests for Information, Request Sprint 1.2.j.

¹⁸ ¹⁹ **END PROPRIETARY***** Again, Birch is plainly not a mass-market, UNE-L provider.

Birch focuses on business services, as is confirmed by a review of the company mission statement: "Our mission is straightforward – build long term value for our investors by providing reliable local, long-distance and Internet communications services to small and mid-sized businesses, while giving each of our customers the respect and attention they deserve...."²⁰ Indeed, Birch states that it "does not serve any residential customers with unbundled DS0 loops."²¹ Although Birch's home page indicates that it does provide some residential service, it qualifies customers for that service on a NPA-wide basis.²² One of my colleagues entered a selection of Texas NPAs (214, 972, 512, 737, 682, 817, 281, 713, 832 and 210) on the Birch residential service qualifying page and was informed in each case that residential service was not available in the area associated with that NPA. I also note that Birch does use SBC UNE-P arrangements, which could be its approach to providing any residential and/or small business services.²³ Based on this information (and the lack of other available information), I have no reason to believe that that Birch uses UNE-L or its own switches to serve residential customers.

¹⁶ Birch Response to MCI's First Requests for Information, confidential attachments MCIC-1 and MCIC-2.

¹⁷ Birch Response to MCI's First Requests for Information, confidential attachment MCIC-2 and Confidential Response to Sprint First Requests for Information, RFI Sprint 1.1.

¹⁸ Birch Confidential Response to Sprint's First Requests for Information, RFI Sprint 2.1.

¹⁹ Birch Confidential Response to MCI's Second Requests for Information, No. MCI 2-4.

²⁰ http://www.birch.com/about_birch/index.shtml.

²¹ Birch response to Sprint First Requests for Information, RFI Sprint 1.2.c.

²² http://www.birch.com/athome/npa_main.html.

²³ Birch Response to SBC First Requests for Information, No. 1-1.

Even if I had not eliminated Birch on the basis of the residential screen, Birch would have dropped out of *****BEGIN PROPRIETARY END PROPRIETARY***** based on the 1% market share screen. Birch's market share *****BEGIN PROPRIETARY END PROPRIETARY***** in any wire center. Thus, Birch's self-deployment of switching to serve mass-market customers is of far too limited a scale to demonstrate that Birch has overcome economic and operational barriers to entry without access to SBC's unbundled switching.

Cable Plus

Cable Plus was acquired by Advantex Communications, Inc. which itself was acquired by Grande Communications in 2003.²⁴ (Indeed, although he lists Cable Plus and Grande as distinct CLECs in Attachment JRL-9, Mr. Loehman himself recognizes that Cable Plus and Grande are the same entity.²⁵) Because of its affiliation with Grande, I have not considered Cable Plus as a separate potential triggering CLEC, but instead combined Cable Plus with Grande for the purpose of my analysis of SBC's trigger claims. I discuss my conclusions with respect to Cable Plus – Grande below under the heading "Grande."

Comcast

Comcast is a traditional cable company that offers telephone service in some, but not all, parts of its existing cable footprint. Comcast's limited geographic scope is ample reason to disqualify the company as a triggering CLEC in any broad geographic market

²⁴ <http://www.x-changemag.com/hotnews/3ah169397.html>.

²⁵ Loehman Direct at 6, Table 1.

such as an MSA.²⁶ Moreover, Comcast does not make any use of UNE-L to supplement its own cable loop plant and does not offer its facilities to other potential market entrants.²⁷ Thus, Comcast's actual deployment does not demonstrate that any other companies could enter SBC's Texas service territory and serve mass-market customers without access to UNE switching.

Cable companies such as Comcast typically initiate local exchange service when they already have an embedded base of facilities constructed for another purpose and an embedded base of video and cable modem customers. The ability to add telephony to an existing cable network does not indicate that competitors without the "first-mover" advantage of a cable franchise would be able to compete with the ILEC without access to unbundled local switching.

Total lines in service and/or market share for a cable telephony provider using its own loop plant also do not provide useful evidence that the national finding of operational impairment has been overcome. Only UNE-L providers can provide such evidence because only these companies deal with hot cuts and the other operational issues associated with the attempt to use SBC loop facilities in conjunction with their own switching to serve mass-market customers.

There are also signs that Comcast may not be aggressively pursuing traditional phone service at all. For example:

²⁶ Indeed, it is difficult to identify the portion of any SBC *wire center or rate center* in which Comcast does offer service. Comcast does not offer service where its facilities do not extend and notes that it does not reach all customers in the rate centers in which it does have some facilities. Comcast Responses to MCI's Second Requests for Information, Nos. 2-10, 2-19 and 2-22.

²⁷ Comcast Response to MCI's Second Requests for Information, No. 2-15. SBC's own data show *****BEGIN PROPRIETARY . END PROPRIETARY*****

Comcast will reverse AT&T Broadband's aggressive telephony acquisition policies and implement its own corporate policy of trialing and then deploying voice over IP services, a senior executive said today. AT&T enlisted more than 1 million telephony customers using conventional constant bit rate [CBR] phone technology. Comcast will maintain these customers, but it won't go looking for more, John Alchin, Comcast's executive vice president and treasurer, said during a luncheon presentation at the Warburg Media day in New York City. "There is an element of cutback on telephony," said Alchin, discussing Comcast's plans to spend more than \$2 billion to upgrade AT&T Broadband plant next year. "While we haven't yet shared with you the details of the capital plans for 2003, you should not expect us to take the telephony product into a whole host of new markets. *It will be a case of supporting the product where it is today without expanding.*"²⁸

Also,

As a result of the Company's reduced marketing efforts and focus on telephone service profitability, Comcast now expects to lose approximately 175,000 Comcast Cable phone customers this year, a modest adjustment from the original expectation of up to a 150,000 telephone customer decline [announced in the February 27, 2003 guidance].²⁹

²⁸ "Comcast Curtailing AT&T Telephony Deployments," Dec. 12, 2002, *Telephony Online*, (emphasis added). A copy of this article is available at http://telephonyonline.com/ar/telecom_comcast_curtailing_att/index.htm.

²⁹ Comcast Third Quarter 2003 Earnings Release, October 30, 2003 (<http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&t=Regular&id=464588&>).

Other articles about Comcast's less-than-aggressive approach to digital telephone services include: Josh Long, "Marketing for Voice Put on Hold, Telephony Not a Priority for Comcast in 2003," *Xchange*, 2/1/03 (<http://www.x-changemag.com/articles/321window2.html>); "Comcast Phone Falling Fast," *Telephony Online*, August 1, 2003, http://telephonyonline.com/ar/telecom_comcast_phone_falling/index.htm; "Cable Telephony Surging," *Telephony Online*, November 26, 2003, http://telephonyonline.com/ar/telecom_cable_telephony_surging/index.htm.

This strategic deployment decision may explain why Comcast *****BEGIN PROPRIETARY. END PROPRIETARY*****³⁰

Additionally, Comcast should not be counted toward the trigger because it does not actually self-provision local switching using its own switches,³¹ which is one of the standard requirements for a competitor to be counted toward the trigger for mass-market switching.³² Comcast asserts that it “has not deployed switches for the provision of local telephone service in Texas,” but uses switches that “are owned and controlled by another unaffiliated provider.”³³ A carrier that does not deploy its own switches can be counted toward the retail trigger under limited circumstances:

While the record indicates that competitors do not currently purchase wholesale switching from non-incumbent-LEC providers, we find, for the limited purposes described herein, that if a carrier were to acquire the long term right to the use of a non-incumbent-LEC switch sufficient to serve a substantial portion of the mass market, that carrier should be counted as a separate, unaffiliated self-provider of switching.³⁴

SBC has not demonstrated that Comcast has acquired a *long-term right* to the use of a non-incumbent-LEC switch sufficient to serve a substantial portion of the mass market. Indeed, it is my understanding that Comcast’s contractual relationship with

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³⁰ Comcast Confidential Responses to Sprint’s First Requests for Information, No. 1.2 and MCI’s First Requests for Information, No. 1-11.

³¹ Comcast Responses to SBC First Requests for Information, requests 1-1 and 1-3 and SBC Second Requests for Information, requests 2-4 through 2-9.

³² *Triennial Review Order* ¶ 499 (competitors counted toward the trigger “should be using or offering their own separate switches”).

³³ Comcast First Supplemental Response to SBC’s First Requests for Information, No. 1-3.

³⁴ *Triennial Review Order* ¶ 499, n. 1551.

SBC has failed to demonstrate that Comcast fulfills all of the requirements of footnote 1551 for an exception to the requirement that CLECs counted toward the retail trigger should own their own, separate switches. (Indeed, SBC has not even attempted to identify how large a portion of the mass market would be required to meet the standard of this exception.)

I have disqualified Comcast from counting toward the retail trigger based on the switch ownership screen. In addition, Comcast should be eliminated as an intermodal competitor that does not serve ubiquitously throughout the relevant SBC geographic markets and has not demonstrated any ability to use UNE-L to supplement the limited extent of its self-deployed loop facilities.

Grande

Like Comcast, Grande is a cable company that offers telephone service in some, but not all, parts of its existing cable footprint. Grande's limited geographic scope is ample reason to disqualify the company as a triggering CLEC in any broad geographic market such as an MSA. Moreover, Grande does not make any use of UNE-L to supplement its own cable loop plant and does not offer its facilities to other potential market entrants.³⁵ Thus, Grande's actual deployment does not demonstrate that any other

³⁵ Advantex and Grande Responses to MCI's Second Requests for Information, MCI 2-3 and MCI 2-10. SBC's own data show *****BEGIN PROPRIETARY. END PROPRIETARY***** Notably, Grande does target customers outside of its service territory using "UNE-P or Third party facilities." Grande Responses to MCI's Second Requests for Information, MCI 2-10. Grande asserts that a number of factors including the uneconomic cost of needed additional facilities, cutover issues, IDLC, lack of OSS capability, remote testing issues, line quality and the need for on-site technicians, would impede its ability to maintain those customers should UNE-P become unavailable. Grande Responses to MCI's Second Requests for Information, MCI 2-12.

companies could enter SBC's Texas service territory and serve mass-market customers without access to UNE switching.

As I noted above, the ability to add telephony to an existing cable network does not indicate that competitors without the advantage of a cable franchise would be able to compete with the ILEC without access to unbundled local switching. Grande confirms this in its explanation regarding why it does not subtend additional SBC wire centers:

First, Grande is a facility based carrier whose primary business is serving customers over its own network. Second, where Grande has a business interest in serving customers, but in an area where Grande's switch cannot be reached except through backhaul facilities, the economics of such backhaul investments to provide voice grade service to mass market customers can be cost prohibitive. Third, where Grande does have a switch, and in those instances where backhaul is not cost prohibitive, other related expenses associated with serving mass market voice customers (e.g.s, EELs, cross connects, transport) are cost prohibitive. Fourth, the presence of multiple facilities-based providers may impact market entry plans for reasons including, for example, access to pole attachments and underground facilities. Overall, any issue affecting addressable market and likely penetration would impact any competitor's entry plans.³⁶

Total lines in service and/or market share for a cable telephony provider using its own loop plant also do not provide useful evidence that the hot cut barrier to entry that was the basis for the FCC's national finding of operational impairment has been overcome. As I noted in regard to Comcast, only UNE-L providers can provide such evidence because only these companies deal with hot cuts and the other operational issues associated with the attempt to use SBC facilities in a UNE-L arrangement to serve mass-market customers.

³⁶ Grande Response to MCI First Requests for Information, request MCIC-8.

Finally, it also appears that Mr. Loehman's E911 line counts for Grande (and perhaps other cable-based providers) may be substantially inaccurate. Grande "has determined (following its recent acquisition of Advantex) that the E911 record counts from the Advantex database do not correlate to the number of customer lines currently served. Investigation into the cause(s) for the discrepancy continues."³⁷ This response illustrates potential difficulties in SBC's reliance on E911 data for Grande and other cable-based providers.

ICG

ICG serves business mass-market customers in Texas via UNE-L, but not residential customers.³⁸ ICG has also confirmed that:

... ICG provisions a DS1 for each customer unless the customer specifically requests a DS0/voice grade line(s) because, in most cases, ICG has determined that it is more cost effective to do so...³⁹

ICG's responses to discovery concerning supposed enterprise and mass-market customers served by its switches make no sense. For example, ICG reports an average of *****BEGIN PROPRIETARY⁴⁰ END PROPRIETARY***** Customers with so many loops per location are not very small businesses with characteristics more like residential customers than like other, larger business customers and hence do not fall within the FCC's definition of mass-market customers. Likewise, ICG reports mass-market loop

³⁷ Grande/Advantex Response to SBC's First Requests for Information, request No. 1-18.

³⁸ ICG Response to SBC's First Requests for Information, No 1-10.

³⁹ ICG Response to SBC's Second Requests for Information, No. 2-12.

⁴⁰ ICG confidential attachment to its Response to SBC First Requests for Information, No. 1-4(iv).

totals using *****BEGIN PROPRIETARY END PROPRIETARY***** capacity counts, which again do not fall within the FCC's definition of mass-market service at all.⁴¹

Based on this information, I excluded ICG from the trigger analysis after applying "serves residential customers" screen because all of its UNE-L customers are businesses – and may indeed be businesses that fall outside any plausible definition of mass-market customers.

SBC identified a total of *****BEGIN PROPRIETARY END PROPRIETARY***** supposed mass-market loops for ICG in *****BEGIN PROPRIETARY END PROPRIETARY***** wire centers in the SBC five MSAs. The supposed ICG mass-market loops range from a minimum of *****BEGIN PROPRIETARY END PROPRIETARY***** mass-market loops per wire center in which SBC found ICG to have any mass-market loops.

ICG's volumes, as reported by SBC, are sufficiently low that I would have *****BEGIN PROPRIETARY END PROPRIETARY***** even if I had not done so on the basis of preceding screens. In fact, ICG *****BEGIN PROPRIETARY END PROPRIETARY***** market share in any SBC wire center. Hence, there are multiple, sufficient reasons not to count ICG toward the retail trigger.

KMC

KMC's responses to discovery in this case make it plain that KMC is not an active mass-market service provider by any reasonable stretch of that concept. KMC provides an illustration of how easily a handful of UNE-L services provisioned to an

⁴¹ ICG confidential attachment to its Response to SBC First Requests for Information, No. 1-8 (and 2-8).

apparent mass-market location (according to SBC) can be misinterpreted as mass-market entry. For example, when asked to “[p]lease identify the percentage of your local customers subscribing to each of your retail pricing plans,” KMC states:

KMC sells only to business customers, and offers a variety of products and services that its customers may choose to purchase alone or in a combination of the customer’s selection. There are no generic “retail pricing plans” because most of KMC’s sales are, in effect, done on an ICB basis. Consequently, there is no meaningful compilation of information available concerning the number of customers purchasing any given KMC “retail pricing plan.”⁴²

Individual Case Basis or ICB pricing is inherently not a mass-market approach. KMC further confirms that it “does not provide residential service.”⁴³ KMC further established that it *****BEGIN PROPRIETARY**⁴⁴ **END PROPRIETARY***** and “does not actively market services in Texas to customers who desire to be served over analog DS0-level loops,” but instead “actively markets only to customers who plan to purchase digital service at capacities that justify the use of DS1-level loops.”⁴⁵ Indeed, KMC asserts that it does not use its switches to provide *****BEGIN PROPRIETARY** **END PROPRIETARY***** in Texas at all.⁴⁶ Finally, KMC explains what SBC likely captures as mass-market loops by stating:

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⁴² KMC Second Supplemental Response to SBC’s First Requests for Information, No. 1-7.

⁴³ KMC Second Supplemental Response to SBC’s First Requests for Information, No. 1-18.

⁴⁴ KMC Confidential Response to MCI’s First Requests for Information, No. MCIC-2.

⁴⁵ KMC response to SBC’s Second Requests for Information, No. 2-11.

⁴⁶ KMC Response to SBC’s First Requests for Information, Nos. 1-2 and 1-4.